IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Civil First Appeal No. 63/88
Lalu Vs. Gehrilal

under Sec. 96 of Code of Civil Procedure against the judgment and decree dated 09.12.1987 passed by the learned Addl. District Judge, Rajsamand.

Date of order : 21.03.2007

PRESENT
HON'BLE MR. BHAGWATI PRASAD, J.

Mr. J.L. Purohit for the appellant.
Mr. R.K. Thanvi for the respondents.

BY THE COURT;

The present appeal has been filed against the judgment and decree passed by the learned Addl. District Judge, Rajsamand in Civil Original Suit No. 19/81 dated 09.12.1987. The suit was filed by Lalu plaintiff appellant asking for cancellation of a sale deed which was purportedly executed by him in relation to Araji NO. 343 for Rs. 20,000/-. Allegations of the plaintiff in plaint were that the aforesaid land was agreed to be sold. A sale deed was executed on stamp paper. At the time when the sale deed was being signed by the

plaintiff, the defendant assured him that he will get money from the bank and will pay to him. On this assurance, plaintiff signed the sale deed and when plaintiff demanded money, defendant told that he will get it deposited in his bank account but to no consequence. He waited for four days, when this was not done, a registered notice was given to the defendant. It is alleged that the plaintiff has been persuaded by deceit and the sale deed got signed by the defendant. The defendant denied the allegations and rebutted the allegations. It was claimed that the sale deed was signed by plaintiff on his own volition. The plaintiff's thought has got changed because the land price increased. On the basis of pleading following issues were famed:-

> " 1- आया प्रतिवादी ने वादी को धोखे में डालकर यह गलत विश्वास दिलाकर कि विक्रय राशि बैंक से लाकर दे देगा विवादग्रस्त विक्रय पत्र पर हस्ताक्षर करायें ?
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> 2- आया प्रतिवादी से विक्रय राशि की रकम मांगी तो प्रतिवादी ने बहाना बताया कि रकम बैंक में वादी के खाते में जमा करा पास बुक लाकर दे देगा तभी विक्रय पत्र रजिस्ट्री हेतु पेश करेगा और इसका क्या प्रभाव हैं ?
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> 3- आया वादी विवादग्रस्त विक्रय पत्र दिनांक 18.5.80 निरस्त कराये जाने का अधिकारी हैं ?
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> 4- प्रतिकार ?"

The trial court decided issue no. 1 and came to the conclusion that the money as alleged in sale deed Ex.1 has been received by seller plaintiff. The plaintiff led oral evidence and said that the fact of receipt amount has wrongly been written in Ex./1 and no amount was paid. The trial court came to the conclusion that once it is admitted in written document, which is registered as receipt of consideration has been acknowledged then oral submission in this regard cannot be accepted. Having held issue No. 1 in favour of the defendant the issue No. 2 and 3 were also held against him.

Learned counsel for the appellant assailing findings of the trial court urged that the sale deed in favour of the plaintiff was a consequence of fraud played upon the plaintiff and, therefore the same is vitiated.

Learned counsel for the appellant stressed that in terms of Sec. 92 of the Evidence Act, 1872 (here referred to as 'The Act of 1872') evidence can be led to establish under proviso 3 to the Section if there is any separate oral agreement then bar contend in substantive Sec. 92 would not be sufficient to exclude the oral evidence as led by the plaintiff which says that consideration has not been paid.

Learned counsel for the appellant further stressed that under Sec. 17 of the Indian Contract Act and Specific Relief Act, 1872 fraud has been defined. The terms made without any intention of performing it has been included in the definition of fraud. The defendant respondent made a promise of making payments subsequently which was not fulfilled by him. To support his arguments, learned counsel relied upon the case reported in AIR 1985 Patna 94 (Ganesh Prasad Vs. Deo Nandan Raut and others) wherein it is held that -

> " I have already noticed the exception that want or failure of consideration, the condition precedent to the transfer, irrespective of the recitals of the document, can be proved by independent evidence. Whether the consideration is executed or is still executory or in other words whether the consideration is actually paid and accepted or not is a question which a Court can determine on such evidence that the parties may lead and the contents of the document of disposition shall not be conclusive for the said purpose."

He has also placed reliance upon the case reported in AIR 1990 Allahabad 47 (Sultan Ahmad (deceased by L.R.'s) Vs. Rashid Ahmad & Others) It is held therein that-

> " the same conclusion is reached by another process of reasoning quite apart from the dictum of pari delicto. There is a more fundamental principle attracted to the

> present case and that is that no one can be permitted to take advantages of his own fraud. In this case from the plaint averments and the evidence of the plaintiff himself the conclusion is inescapable that the transaction was fraudulent intended to take the property out of the reach of the creditors"

Learned counsel for the respondents per contra relied upon the case reported in (1998) 7 Supreme Court Cases 498 (Bishundeo Narain Rai (dead) by L.R.'s & Ors. Vs. Anmol Devi & Ors.) and also relied upon another case reported in (1999) 3 SCC 573 (Vidhhyadhar Vs.Mankikrao & Anr.). It is held therein that-

> "42. This Clause obviously applies to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this Clause is based on the English doctrine of Equitable Lien as propounded by Baron Rolfe in Goode & Anr. V. Burton. This clause confers statutory recognition on the English Doctrine of Equitable Lien. As pointed out by the Privy Council in Webb & Anr. V. Macpherson the statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (See: Venkataperumal Naidu V. Rathnasabhapathi Chettiar, AIR 1953 Mad. 821, Shobhalal Shyamlal Kurmi V. Sidhelal Halkelal Bania. Air 1939 Nag. 210 and Basalingaya Revanshiddappa V. Chinnaya Karibasappa) 247.
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> 43.In view of the above, the High Court was

> wholly in error in coming to the conclusion that there was no sale as only a sum of Rs. 500/- was paid to defendant NO.2 and the balance amount of Rs. 4,500/- was not paid. Since the title in the property had already passed, even if the balance amount of sale price was not paid, the sale would not become invalid. The property sold would stand transferred to the buyer subject to the statutory charge for the unpaid part of the sale price. "

Learned counsel for the respondents submitted that the best case of the plaintiff is that he was not paid consideration. Execution of the sale deed is not denied. Once the execution of the sale is admitted then rights in property passed under Sec. 54 of the Transfer of Property Act, 1882 to the defendant and in that view of the matter, the remedy of the plaintiff lies elsewhere than asking for cancellation of the sale deed.

I have considered the rival submissions and given my thoughtful consideration. As and when the sale deed is executed then by force of Sec. 54 of the Registration Act, 1908 the title passes to the vendor, vendee in the case has admitted the execution of the sale deed. As regards the non payment of the consideration, only oral evidence is led to controvert the fact of execution of sale deed the Ex./1 which shows that consideration has been passed. This content of Ex.1 falls short of any fraud under Sec. 57 of the Act of

1872.

If at all the consideration was not passed on then the remedy of the appellant plaintiff lies elsewhere than asking for cancellation. In any case Sec. 92 of the Act of 1872 is a greator bar for the plaintiff to show by oral evidence that money was not paid. When there is recital in the document that money was paid, then oral evidence led by the plaintiff appellant is not of such a worth which establishes any fraud or non payment in favour of the plaintiff appellant. The cases relied upon by the appellant does not help his cause. The findings of the Hon'ble Supreme Court in Bishundeo Narain Rai (supra) referred herein above only permits plaintiff to ask for a suit for money. As regards the title, cancellation cannot be granted in favour of the appellant. In view of the aforesaid discussion, this court is of the considered opinion that the findings of the trial court in favour of the defendant respondent are not liable to be disturbed and the appeal of the appellant is not liable to be accepted. The appeal has no force and the same is hereby dismissed.

(BHAGWATI PRASAD), J.

ns.